

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

DEREK ANDREW NORMAN,)
Petitioner,)
v.) CIV 08-01592 PHX MHM (MEA)
CHARLES L. RYAN and) REPORT AND RECOMMENDATION
ARIZONA ATTORNEY GENERAL,)
Respondents.)

TO THE HONORABLE MARY H. MURGUITA:

On or about August 23, 2008, Petitioner filed a *pro se* petition seeking a writ of habeas corpus pursuant to 42 U.S.C. § 2254. Respondents filed a Limited Answer to Petition for Writ of Habeas Corpus ("Answer") (Docket No. 11) on February 26, 2009. Respondents argue Petitioner's habeas petition was not timely filed. Additionally, Respondents contend Petitioner procedurally defaulted his federal habeas claims by failing to properly exhaust them in the state courts.

I Procedural History

In January of 2004 Petitioner was charged with one count of sexual conduct with a minor and two counts of molestation of a child (Docket No. CR2004-006012). See Answer, Exh. A. In January of 2005 Petitioner was charged with one

1 count of sexual exploitation of a minor, in Docket No. CR2005-
2 006127. Id., Exh. B. The later charge involved the possession
3 of child pornography. Id., Exh. B.

4 Pursuant to written plea agreements, Petitioner pled
5 guilty in both cases on January 12, 2005. Id., Exh. C & Exh. D.
6 With regard to the charges stated in Docket No. CR2004-006012,
7 Petitioner pled guilty to one count of attempted sexual conduct
8 with a minor. Id., Exh. D. The written plea agreement noted
9 the presumptive sentence of 10 years incarceration and a minimum
10 sentence of 5 years incarceration and stated Petitioner's
11 sentence would fall within that range. Id., Exh. D. The plea
12 agreement states it is "dependent upon a guilty plea to Count
13 One in CR2005-006127." Id., Exh. D.

14 With regard to Docket No. CR2005-006127, Petitioner
15 pled guilty to attempted sexual exploitation of a minor. Id.,
16 Exh. C. The written plea agreement noted a minimum sentence of
17 10 years, a presumptive sentence of 17 years, and a maximum
18 sentence of 24 years incarceration. Id., Exh. C. The plea
19 agreement stated Petitioner was to be placed on lifetime
20 supervised probation "subsequent to any prison sentence imposed
21 in CR2004-006012.... This plea is dependent upon a guilty plea
22 to Count One in CR2004-006012." Id., Exh. C. The plea
23 agreement also provided Petitioner would register as a sex
24 offender and provide a DNA sample to law enforcement.

25 Both plea agreements also waived Petitioner's right to
26 appeal his convictions or the imposition of any sentence which
27 was consistent with the written agreements. Id., Exh. C & Exh.

1 D. The Maricopa County Superior Court reviewed the written plea
2 agreements with Petitioner on January 12, 2005, and accepted his
3 guilty pleas in both cases at that time. Id., Exh. E & Exh. F.

4 On April 15, 2005, Petitioner was sentenced to a term
5 of 7 years imprisonment pursuant to his conviction in CR2004-
6 006012. Id., Exh. G & Exh. H. At that time Petitioner was
7 sentenced to a consecutive term of lifetime probation pursuant
8 to his conviction in CR2005-006127. Id., Exh. G & Exh. H.

9 Petitioner did not timely file his first appeal "as of
10 right," i.e. an action for state post-conviction relief pursuant
11 to Rule 32, Arizona Rules of Criminal Procedure, within ninety
12 days of being sentenced. Petitioner did file a notice of post-
13 conviction relief with regard to his conviction and sentence in
14 the 2005 case on July 20, 2007. Id., Exh. I & Exh. J. In that
15 Rule 32 action Petitioner asserted his sentence of lifetime
16 probation constituted cruel and unusual punishment and also
17 violated his right to equal protection. Petitioner also argued
18 his right to due process of law was violated by the plea
19 bargaining process. Id., Exh. I & Exh. J.

20 The state trial court dismissed Petitioner's Rule 32
21 action on August 15, 2007, noting it was not timely. Id., Exh.
22 K. The state trial court also concluded Petitioner's sentence
23 did not violate the United States' constitution's prohibition
24 against cruel and unusual punishment and that Petitioner's
25 rights to due process and equal protection were not violated.
26 Id., Exh. K. Petitioner appealed this decision to the Arizona
27 Court of Appeals, id., Exh. L, which denied review on April 23,
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1 2008. Id., Exh. M. Petitioner sought review of his claims by
 2 the Arizona Supreme Court, which denied review on July 28, 2008.
 3 Id., Exh. O.

4 In his federal habeas action Petitioner asserts he is
 5 entitled to relief because his sentence of lifetime probation
 6 constitutes cruel and unusual punishment in violation of the
 7 Fifth, Eighth, and Fourteenth Amendments. Petitioner also
 8 contends the sentence of lifetime probation violates his right
 9 to equal protection under the Fifth and Fourth Amendments.
 10 Additionally, Petitioner argues the imposition of lifetime
 11 probation rendered the plea bargaining process fundamentally
 12 unfair in violation of the due process protections of the Fifth
 13 and Fourteenth Amendments.

14 **II Analysis**

15 **The petition is barred by the statute of limitations**

16 The petition seeking a writ of habeas corpus is barred
 17 by the applicable statute of limitations found in the
 18 Antiterrorism and Effective Death Penalty Act ("AEDPA"). The
 19 AEDPA imposed a one-year statute of limitations on state
 20 prisoners seeking federal habeas relief from their state
 21 convictions. See, e.g., Lott v. Mueller, 304 F.3d 918, 920 (9th
 22 Cir. 2002). The AEDPA provides that a petitioner is entitled to
 23 tolling of the statute of limitations during the pendency of a
 24 "properly filed application for state post-conviction or other
 25 collateral review with respect to the pertinent judgment or
 26 claim." 28 U.S.C. § 2244(d)(2)(2006 & Supp. 2008). See also
 27 Artuz v. Bennet, 531 U.S. 4, 8, 121 S. Ct. 361, 363-64 (2000);

1 Harris v. Carter, 515 F.3d 1051, 1053 (9th Cir. 2008).

2 Because Petitioner pled guilty and thereby waived his
3 right to a direct appeal, Petitioner's convictions and sentences
4 became final at the expiration of the time allowed for filing an
5 action for state post-conviction relief pursuant to Rule 32,
6 Arizona Rules of Criminal Procedure, i.e., on July 15, 2005.

7 See Summers v. Schriro, 481 F.3d 710, 711 (9th Cir. 2007)
8 (holding that, in Arizona, the statute of limitations began to
9 run upon "the conclusion of the Rule 32 of-right proceeding and
10 review of that proceeding, or [upon] the expiration of the time
11 for seeking such proceeding or review."). Accordingly,
12 Petitioner had one year from July 15, 2005, i.e., until July 15,
13 2006, to seek federal habeas relief, not counting any time
14 during which the statute of limitations was statutorily tolled
15 by the pendency of any properly-filed state action for post-
16 conviction relief. See Bunney v. Mitchell, 262 F.3d 973, 974
17 (9th Cir. 2001).

18 Petitioner did not file a timely Rule 32 action in the
19 state courts which would have tolled the AEDPA's statute of
20 limitations. Petitioner did file a notice of post-conviction
21 relief with regard to his conviction and sentence in the 2005
22 case on July 20, 2007, more than one year after the statute of
23 limitations with regard to a federal habeas action challenging
24 the conviction and sentence expired. That state Rule 32 action
25 could not and did not restart the already-expired statute of
26 limitations for filing Petitioner's federal habeas action. See
27 Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir. 2003), citing

1 Tinker v. Moore, 255 F.3d 1331, 1333 (11th Cir. 2001); Preston
 2 v. Gibson, 234 F.3d 1118, 1120 (10th Cir. 2000). A state-court
 3 petition that is filed after the expiration of the statute of
 4 limitations under the AEDPA does not revive the running of the
 5 limitations period. See Jiminez v. Rice, 276 F.3d 478, 482 (9th
 6 Cir. 2001); Fisher v. Gibson, 262 F.3d 1135, 1142-43 (10th Cir.
 7 2001); Payton v. Brigano, 256 F.3d 405, 408 (6th Cir. 2001).

8 Petitioner's untimely Rule 32 action also could not
 9 toll the statute of limitations because it was not a "properly
 10 filed" action for state post-conviction relief. See Pace v.
 11 DiGuglielmo, 544 U.S. 408, 413, 125 S. Ct. 1807, 1811-12 (2005)
 12 (holding that a state petition that is not filed within the
 13 state's required time limit is not "properly filed.").

14 **Equitable tolling of the statute of limitations**

15 Petitioner is not entitled to the equitable tolling of
 16 the statute of limitations. A petitioner seeking equitable
 17 tolling must establish two elements: "(1) that he has been
 18 pursuing his rights diligently, and (2) that some extraordinary
 19 circumstance stood in his way." Pace v. DiGuglielmo, 544 U.S.
 20 408, 418, 125 S. Ct. 1807, 1814-15 (2005).

21 The Ninth Circuit Court of Appeals has determined
 22 equitable tolling of the filing deadline for a federal habeas
 23 petition is available only if extraordinary circumstances beyond
 24 the petitioner's control make it impossible to file a petition
 25 on time. See Harris v. Carter, 515 F.3d 1051, 1054-55 & n.4
 26 (9th Cir.), cert. denied, 129 S. Ct. 397 (2008); Gaston v.
 27 Palmer, 417 F.3d 1030, 1034 (9th Cir. 2003), modified on other

1 grounds by 447 F.3d 1165 (9th Cir. 2006). Equitable tolling is
2 only appropriate when external forces, rather than a
3 petitioner's lack of diligence, account for the failure to file
4 a timely claim. See Miles v. Prunty, 187 F.3d 1104, 1107 (9th
5 Cir. 1999).

6 Equitable tolling is to be rarely granted. See Jones
7 v. Hulick, 449 F.3d 784, 789 (7th Cir. 2006); Stead v. Head, 219
8 F.2d 1298, 1300 (11th Cir. 2000) (holding this remedy is
9 "typically applied sparingly"). The petitioner must establish
10 a causal connection between the alleged roadblock to their
11 timely filing of their federal habeas petition and the actual
12 failure to file the petition on time. See Gaston, 417 F.3d at
13 1034; Lawrence v. Florida, 421 F.3d 1221, 1226-27 (11th Cir.
14 2005). It is Petitioner's burden to establish that equitable
15 tolling is warranted in his case. Gaston, 417 F.3d at 1034.

16 A petitioner's *pro se* status, ignorance of the law, and
17 lack of representation during the applicable filing period do
18 not constitute extraordinary circumstances justifying equitable
19 tolling because such circumstances are not "extraordinary."
20 See, e.g., Rasberry v. Garcia, 448 F.3d 1150, 1154 (9th Cir.
21 2006); Shoemate v. Norris, 390 F.3d 595, 598 (8th Cir. 2004).
22 Additionally, a federal habeas petitioner seeking equitable
23 tolling must also act with "reasonable" diligence "throughout
24 the period he seeks to toll." Warren v. Garvin, 219 F.3d 111,
25 113 (2d Cir. 2000). See also Roy v. Lampert, 465 F.3d 964, 969
26 (9th Cir. 2006); Jones v. Morton, 195 F.3d 153, 159 (3d Cir.
27 1999).

1 Petitioner has not met his burden of establishing that
2 there were extraordinary circumstances beyond his control which
3 made it impossible for him to file a timely federal habeas
4 petition, or that any state action was the "but for" cause for
5 his failure to timely file his federal habeas action. See Brown
6 v. Barrow, 512 F.3d 1304, 1306-07 (11th Cir. 2008) (holding the
7 petitioner has a strong burden to plead specific facts
8 supporting their claim of extraordinary circumstances). See
9 also Pace, 544 U.S. at 418-19, 125 S. Ct. at 1815 (concluding
10 that the petitioner was not entitled to equitable tolling
11 because he was not misled or confused about the exhaustion of
12 his state remedies and filing his federal habeas petition).
13 Petitioner has not met his burden of establishing that there
14 were extraordinary circumstances beyond his control which made
15 it impossible for him to file a timely federal habeas petition.
16 Compare Sanchez v. Cambra, 137 Fed. App. 989, 990 (9th Cir.
17 2005). Additionally, Petitioner did not act with reasonable
18 diligence throughout the time period he seeks to toll. See
19 Miller v. Marr, 141 F.3d 976, 978 (10th Cir. 1998) (rejecting a
20 claim to equitable tolling where the petitioner "provided no
21 specificity regarding the alleged lack of access and the steps
22 he took to diligently pursue his federal claims"). Compare Roy,
23 465 F.3d at 969-72.

24 **III Conclusion**

25 Petitioner did not file his federal habeas petition
26 within the time specified by the AEDPA. Petitioner does not
27 offer a basis for the equitable tolling of the statute of
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1 limitations applicable to his habeas petition.

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3 **IT IS THEREFORE RECOMMENDED** that Mr. Norman's Petition
4 for Writ of Habeas Corpus be **denied and dismissed with**
5 **prejudice.**

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7 This recommendation is not an order that is immediately
8 appealable to the Ninth Circuit Court of Appeals. Any notice of
9 appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate
10 Procedure, should not be filed until entry of the district
11 court's judgment.

12 Pursuant to Rule 72(b), Federal Rules of Civil
13 Procedure, the parties shall have ten (10) days from the date of
14 service of a copy of this recommendation within which to file
15 specific written objections with the Court. Thereafter, the
16 parties have ten (10) days within which to file a response to
17 the objections. Pursuant to Rule 7.2, Local Rules of Civil
18 Procedure for the United States District Court for the District
19 of Arizona, objections to the Report and Recommendation may not
20 exceed seventeen (17) pages in length.

21 Failure to timely file objections to any factual or
22 legal determinations of the Magistrate Judge will be considered
23 a waiver of a party's right to de novo appellate consideration
24 of the issues. See United States v. Reyna-Tapia, 328 F.3d 1114,
25 1121 (9th Cir. 2003) (en banc). Failure to timely file
26 objections to any factual or legal determinations of the
27 Magistrate Judge will constitute a waiver of a party's right to

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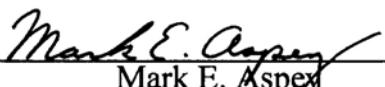
1 appellate review of the findings of fact and conclusions of law
2 in an order or judgment entered pursuant to the recommendation
3 of the Magistrate Judge.

4 DATED this 1st day of April, 2009.

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Mark E. Asprey

8 United States Magistrate Judge

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